IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**Criminal No. 4:15-CR-483**
	§	
JAMES PATRICK BURKE	§	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS DEFENDANT'S STATEMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the United States of America, by and through Kenneth Magidson, United States Attorney in and for the Southern District of Texas, and Kimberly Ann Leo, Assistant United States Attorney, and files this response to defendant's motion to suppress evidence and statements.

I.

Facts

On August 14, 2015, Federal Bureau of Investigations (hereinafter referred to as "FBI") Special Agent Truong Nguyen (hereinafter referred to as "SA Nguyen") executed a federal search warrant at a residence in McAllen, Texas belonging to the Defendant, James Patrick Burke. The search warrant was obtained based on information that led investigators to believe that the Defendant was accessing files from a website known to contain child pornography. On February 23, 2015, the Defendant accessed a file entitled "valya thread". This post contained links and passwords to a video of what posters described as a 9-year-old girl engaged in penetrative sexual activity with an adult male. This thread was posted in the "Preteen Videos", "Girls HC" section. The Defendant also accessed a post that contained a link to a set of images that depicted a young prepubescent child being orally penetrated by the penis of an adult male.

During this same date, the Defendant additionally accessed a post that contained a link to a set of thumbnail images from a video that depicted a young prepubescent girl sitting with an adult male. The young girl is then shown being orally penetrated by the adult male's penis.

During the execution of the search warrant, agents encountered the Defendant as he was arriving at the residence. Special Agents executing the search warrant advised the Defendant that they were at his residence for the purpose of executing a federal search warrant related to removable media devices. The Defendant agreed to voluntarily speak with the agents and was transported to the FBI offices. Once at the FBI office, SA Nguyen and McAllen Task Force Officer Jose Mireles (hereinafter referred to as "TFO Mireles") interviewed the Defendant. SA Nguyen read the Defendant his Miranda rights in the English language from a preprinted form while TFO Mireles witnessed this. The Defendant stated that he understood his rights, waived his rights, and agreed to an interview. The Defendant then signed the bottom of the form indicating that he understood his rights and that he was freely and voluntarily waiving them.

During the time that SA Nguyen and TFO Mireles were questioning the Defendant, he was asked if he would take a polygraph. The Defendant stated that he would and Special Agent Robert Gutierrez (hereafter referred to as "SA Gutierrez") came into the room to administer the polygraph. At that time, SA Gutierrez reaffirmed with the Defendant that he was given his Miranda warnings. Prior to the polygraph being administered, the Defendant gave an oral statement to the agents admitting that he had downloaded and viewed child pornography from the Internet. The Defendant stated that he knew that it was wrong and illegal. The Defendant further stated that he would delete the movies after viewing them and that he did not have any movies or images on his computer. The Defendant's oral statement was videotaped.

II.

Defendant's Motion

The Defendant has filed a motion to suppress the Defendant's statements. The Defendant alleges that his statement was obtained through coercion and improper influence. The Defendant also alleges that his statement was obtained in violation of his right to counsel and right to remain silent. Finally, the Defendant alleges that his statement was a result of an unlawful detention in which he was not advised of his rights and during which he never waived his rights.

III.

Government's Response

A. Defendant's Motion Should Be Denied Without a Hearing Because His Motion Presents No Material Issue of Fact as Required by CrLR12.2

It is the government's position that the Defendant's motion should be summarily denied without a hearing because the Defendant's motion does not present any material issues of fact with any particularity as required by Rule 12 of the Criminal Rules of the Local Rules for the Southern District of Texas. CrLR12.2 provides:

A pretrial motion shall be in writing and state specifically the basis for the motion. The motion shall be supported by a statement of authority. It shall also be accompanied by a separate order granting the relief requested and by an averment that the movant has conferred with the respondent, but that an agreement cannot be reached on that disposition of the motion. *If the motion presents issues of fact, it shall be supported by affidavit or declaration which sets forth with particularity the material facts at issue.* An unopposed motion and its order must bear in the captions "unopposed." (Emphasis added).

The Defendant has failed to present, with particularity, any material facts at issue in his motion. The Defendant does not give any facts to illustrate how his statement was obtained by coercion nor improper influence. The Defendant also does not give any facts as to how his statement was obtained in violation of his right to counsel nor in violation of his right to remain silent. Further, the Defendant does not give any facts that would support how his statement was a result of an unlawful detention in which he was not advised of his rights and in which he did not waive his rights. A court need not act upon general or conclusory assertions. *United States V. Harrelson*, 705 F.2d 733, 737-38 (5th Cir. 1983) (holding denial of a motion to suppress without a hearing was justified where defendant made only "two oblique references" to factual allegations the defendant claimed necessitated a suppression hearing, observing "hearings on motions to suppress are not discovery proceedings, but are instead designed for the presentation of evidence in support of factual allegations which, is proven, would justify the relief sought").

Pursuant to CrLR12.2, and for the reasons discussed in Section B of the Government's response, the Defendant's motion should therefore be summarily denied without a hearing.

B. Defendant's Statement

Statements by a defendant while in custody are admissible against him only if prior to any questioning he has been informed of (1) his right to remain silent; (2) any statement he makes may be used as evidence against him; (3) he has a right to an attorney, either retained or appointed, prior to and during any questioning; (4) and he has the right to terminate the interview at any time. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Further, the defendant must make a voluntary, knowingly, and intelligent waiver of these rights. *Id*.

In order for a defendant to validly waive his rights the relinquishment of the right must be voluntary in the sense that it was the product of a free and deliberate choice and the waiver must be made with full awareness of the right being abandoned and the consequences of doing so. *Soffar* *v. Cockrell*, 300 F.3d 588, 592 (5th Cir. 2002). The burden is on the United States to show that the defendant's waiver of his rights against self-incrimination was voluntarily, knowingly, and intelligently made. *United States v. Sonderup*, 639 F.2d 294, 298 (5th Cir. 1981).

In this case the Defendant was given his Constitutional warnings and he chose to waive them in writing. The Defendant was read his Miranda warnings by SA Nguyen and was given a copy of them to sign off on indicating that he would like to waive them. The Defendant then signed the bottom of the form indicating that he understood his rights and that he was freely and voluntarily waiving them. By signing the waiver the Defendant also acknowledged that he was waiving his rights without threat or intimidation and without the promise of reward or immunity. At no time did the Defendant indicate to SA Nguyen that he did not understand his rights. Further, at no time did the Defendant indicate to SA Nguyen that he wished to invoke any of his rights and terminate his interview. Later in the interview, the Defendant reaffirmed his Miranda warnings when SA Gutierrez began to talk to him about taking the polygraph examination. The United States has clearly shown that the Defendant was given his rights and that he voluntarily, knowingly, and intelligently waived them. Therefore, the statements by the Defendant should not be suppressed and the United States should be free to use them as evidence against him if they so choose.

IV.

WHEREFORE, PREMISES CONSIDERED, the Government requests that the Court deny the defendant's motion to suppress statements.

Respectfully submitted,

KENNETH MAGIDSON
United States Attorney

s/ Kimberly Ann Leo
Kimberly Ann Leo
Assistant United States Attorney
Texas Bar No. 24029686
Fed. I.D. No. 940441

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Response to Defendant's Motion to Suppress Statements was on this 10th day of December, 2015 filed by ECF and served on Mark Anthony Diaz, attorney for James Patrick Burke.

s/ Kimberly Ann Leo
Kimberly Ann Leo
Assistant United States Attorney